



319 N. Fourth St., Ste. 800
St. Louis, MO 63102
(314) 231-4181 facsimile (314) 231-4184
www.greatriverslaw.org
Founding President: Lewis C. Green 1924-2003

President

Bruce A. Morrison (*Licensed in MO, IL*)

Staff Attorneys

Bob H. Menees (*Licensed in MO, OR*)

Sarah W. Rubenstein (*Licensed in MO, IL*)

Ethan Thompson (*Licensed in MO, DC*)

Director of Development and Community Outreach

Linden Mueller

August 2, 2023

VIA FOIAONLINE.GOV

EPA Region VII FOIA Coordinator

*Re: Freedom of Information Act Request: Records relating to BCP Ingredients'
Verona, MO Facility, FRS # 110000444788*

Dear FOIA Coordinator:

This is a request for public records under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), from Great Rivers Environmental Law Center ("Great Rivers"). Great Rivers is a nonprofit public interest environmental organization providing free and reduced-fee legal services to individuals, organizations, and citizen groups who are working to protect the environment and public health. It is not our intention to use these records for commercial purposes, but instead to aid the public in better understanding the environmental and public health impacts of the air emissions from the BCP Ingredients' Verona facility, located at 299 Extension Street in Verona, Missouri, in Lawrence County (the "Facility").

REQUESTED RECORDS

Great Rivers requests copies of the following records:

1. Records of any violations of the Clean Air Act at the Facility occurring within the last five years;
2. All records of annual compliance certifications for the Facility submitted to EPA in the last five years, including all reports of deviations, Part 64 exceedances and excursions submitted with such annual certifications, as required by the Facility's Part 70 Operating Permit (see pp. 25-26 of the Facility's current operating permit);

3. Records of any air pollution enforcement actions undertaken at the Facility within the last five years, including but not limited to informal enforcement actions, letters of warning, notices of violation, abatement orders, administrative orders on consent, compliance commitment agreements, settlement agreements, consent decrees or consent judgments;
4. Records of inspections conducted by EPA at the Facility within the last five years, including but not limited to the 16 Risk Management Program findings identified by EPA in June of 2022 as a result of the April 2022 rail car release at the Facility;
5. All records of EPA communications with the public regarding the Facility or air quality in Verona, MO from the last five years;
6. Records of stack tests performed at the Facility within the last five years;
7. Records relating to a spill that occurred at the Facility on or about April 8, 2022; and
8. Records of all ethylene oxide air monitoring data at the Facility from the last five years.

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, databases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in EPA’s possession and control. If such records are no longer under the control of EPA but were at any time, please refer this request to the relevant federal agency or agencies. This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A). If you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will

be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

In addition, if you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b). Great Rivers is willing to receive records on a rolling basis.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily-accessible” means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B). Please provide all records in a readily accessible, electronic .pdf format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or if that is not possible; (2) in .pdf format, without any “profiles” or “embedded files.” Profiles and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .pdf file. We appreciate the inclusion of an index.

RECORDS DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in Great Rivers taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to me at the following address:

Sarah Rubenstein
Great Rivers Environmental Law Center
319 N. 4th St., Suite 800
St. Louis, MO 63102
srubenstein@greatriverslaw.org

Alternatively you may produce the records to me through FOIAOnline.gov. If you find that this request is unclear, or if the responsive records are voluminous, please call me at (314) 231-4181 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Great Rivers and its clients with access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ..." 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. Great Rivers Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). EPA's regulations at 40 C.F.R. § 2.107(1)(2) and (3) establish the same standard. Thus, EPA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. As shown below, Great Rivers meets each of these factors.

A. The Subject of This Request Concerns "The Operations or Activities of the Federal Government."

The subject matter of this request concerns the operations and activities of EPA at the Facility. The request seeks records concerning EPA's regulatory activities with respect to emission controls at the Facility. The request will provide Great Rivers with crucial insight into whether the Facility is in compliance with relevant laws and regulations, whether they have

committed violations, and what type of regulatory or enforcement response EPA has taken in response thereto. It is clear that evaluating the requested records will provide Great Rivers with reasonably specific insight into EPA's decisions regarding the regulation of emissions from the Facility. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, Great Rivers meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records will be meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public. Disclosure of the requested records will allow Great Rivers to ascertain the status of the Facility's compliance with relevant air emission control statutes and regulations, and EPA's regulatory decisions with respect to the Facility. In addition, the requested records will permit Great Rivers to convey to Verona residents and other members of the public information about any impact the Facility has had on Verona's air quality. Based on Great Rivers' ability to disseminate this type of information to the public as described in Section II below, disclosure of the requested records is likely to contribute to a broader public understanding of EPA's operations and activities in the Verona area.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of Air Quality and the Data EPA Evaluated in Regulating the Area.

The requested records will contribute to public understanding of the air quality in the area, the impact the Facility has had on air quality, what analysis and decision-making steps have been taken by EPA regarding regulation and enforcement activities at the Facility, and whether those steps are consistent with facility permits and applicable statutes and EPA regulations. What EPA considers when evaluating and deciding how it will regulate sources of pollution generally, and the Facility specifically, are areas of interest to a reasonably broad segment of the public, especially for residents of Verona who live in close proximity to the Facility. Great Rivers will use any information it obtains from the disclosed records to educate the residents of Verona and the public generally about the air quality of their community. *See Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 (D. Idaho 2004) (“...find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Great Rivers intends to disseminate the information contained in any responsive records received as a result of this FOIA request to the public and concerned Verona residents. Great Rivers is uniquely suited to distribute information to the public and potentially impacted individuals. Further, Great Rivers intends to evaluate the information contained in the records and disseminate that information through the means discussed in Section II below. As a result, disclosure of the requested information will result in the distribution of information about

Verona's air quality to a broad audience of people who are interested in the subject matter. *Ettlinger*, 596 F. Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dept. of Justice*, 19 F.3d 807, 814-15 (2nd Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Community Legal Services. v. Dept. of Housing & Urban Development*, 405 F. Supp. 2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have the ability to easily evaluate the requested records, which concern how EPA has made such decisions to regulate emissions from the Facility, because the requested records are not publicly available. *See Community Legal Services*, 405 F. Supp. 2d at 560 (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...."

Disclosure of the requested records is not only "likely to contribute," but is certain to contribute, to public understanding of what steps EPA has taken regarding the air quality in the Verona area, the impact the Facility has had on Verona's air quality, what analysis and decision-making steps have been taken by EPA regarding regulation and enforcement activities at the Facility, and whether those steps are consistent with facility permits and applicable statutes and EPA regulations. The public is always well-served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records will educate the public about EPA operations and activities.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

Great Rivers is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of what steps EPA has taken to regulate a significant source of emissions in the Verona area, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about how EPA is complying with the Federal environmental regulations and its own agency regulations. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of FOIA. Thus, Great Rivers meets this factor as well.

II. Great Rivers Will Publicly Disseminate the Requested Information.

Once the requested information is made available, Great Rivers intends to analyze it and present its conclusions to the public. Great Rivers will share the synthesized information with the public and Verona residents. It intends to do so by communicating directly with Verona residents and by sharing information about the records it receives in response to this request with the public generally. Great Rivers shares information with the public through its website, social media sites, blog posts, newsletters, email, and presentations open to the public. Great Rivers is a 501(c)(3) non-profit organization committed to providing free and reduced-fee legal services to individuals, organizations and citizen groups working to protect the environment and public health. The organization works to protect the environment and public health by counseling the public regarding environmental and public health issues. The organization has over 400 annual donors, and many hundreds more people and organizations who are not donors receive its newsletters, news releases and social media posts. These media are used to disseminate information relating to issues that Great Rivers is working on so that the public may better understand the activities engaged in by government agencies. Great Rivers has been involved in the oversight of numerous government agencies for years and has consistently displayed its ability to disseminate information granted to them through FOIA. Thus, it is clear that the requested records will contribute to an understanding of EPA operations and activities and Great Rivers will disseminate the requested information broadly.

Public oversight and enhanced understanding of EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney*, 19 F.3d at 815. Great Rivers need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for Great Rivers to show how it distributes information to the public generally. *Id.* Nevertheless, Great Rivers will disseminate the information as described above in this instance, and Great Rivers clearly has demonstrated an ability to do so generally in the past.

III. Obtaining the Requested Records is of No Commercial Interest to Great Rivers.

Great Rivers' desire to access the requested records arises out of its organizational mission to protect the environment and public health. Great Rivers has no commercial interest in the requested records. Instead, it seeks to obtain copies in order to learn more about a significant source of emissions in Verona, and to determine whether EPA is properly controlling emissions from the Facility within acceptable levels. Great Rivers' intention is to use any information obtained to educate the public and Verona residents about environmental and public health risks posed by the Facility. Clearly, Great Rivers' request does not arise out of any commercial interest.

Further, as mentioned above, Great Rivers is a non-profit 501(c)(3) organization committed to providing free and reduced-fee legal services to individuals, organizations and citizen groups working to protect the environment and public health. Great Rivers provides legal

representation only in situations where traditional for-profit legal representation would not otherwise be available, working purely out of an interest in protecting the environment and public health. Accordingly, Great Rivers also has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, Great Rivers qualifies for a full fee waiver. We hope that EPA will immediately grant this fee waiver request and begin to search for and disclose the requested records without any unnecessary delays. If you have any questions, please contact me at (314) 231-4181 or srubenstein@greatriverslaw.org. All records and any related correspondence should be sent to my attention at the address above.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sarah Rubenstein", with a stylized flourish at the end.

Sarah Rubenstein
Staff Attorney